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SUBJECT: Vietnam: Review of BTA Implementation

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OVERVIEW

¶1. (U) December 10 will mark the second anniversary of the entry-into-force of the U.S.-Vietnam Bilateral Trade Agreement (BTA). Ensuring timely and effective implementation of the BTA remains a critical component of our economic relations with Vietnam. We continue to provide significant technical assistance to the GVN in support of their efforts to implement the BTA through the USAID-funded Support for Trade Acceleration (STAR) Project, the U.S.-Vietnam Trade Council (USVTC) and other USG sponsored technical assistance programs provided by individual agencies. The impact of the BTA on bilateral trade remains impressive. In the first eight months of 2003, Vietnam's exports to the U.S. reached USD 3.2 billion, up 142 percent over the same period in 2002. U.S. exports to Vietnam through August were USD 409 million (excluding USD 535 million in aircraft sales), up 29 percent (196 percent, including aircraft sales) from the same period in 2003.

¶2. (U) This cable provides an overview of GVN efforts to implement key aspects of the BTA and highlights obligations that will come due on December 10 this year.

Chapter 1: Trade in Goods

¶3. (SBU) The trade in goods chapter of the BTA includes provisions on MFN and national treatment for goods, the granting of trading rights, elimination of non-tariff barriers, customs valuation, import licensing, and tariff reductions. This year, Vietnam is obligated to begin applying WTO-level standards for customs valuation for U.S. imports. In December 2004, Vietnam must reduce tariff rates on a number of agricultural and industrial products on average by one-third to one-half their current rates.

-- Customs: Vietnam's current customs valuation procedures are generally based on reference prices. In June 2002, the Government issued Decree 60 establishing rules for customs valuation based on transaction value, in accordance with WTO principles. Decree 60 applies to goods imported from countries to which Vietnam has made a commitment on customs valuation. Under the BTA, Vietnam is obligated to begin applying transaction value for U.S. imports in December. The General Department of Customs expects to finalize implementing legislation for Decree 60 in time to meet this obligation. Despite the fact that no exceptions are included in the BTA, Decree 60 reserves Vietnam the right to apply minimum tax calculation prices on a number of items "in order to protect the State's interests and domestic production." The Ministry of Finance, in coordination with concerned ministries and agencies, is working on a list of the exempted items.

-- It is highly likely that implementation of the new customs rules will be extremely problematic. The technical capacity of the customs department is extremely low and corruption is a serious problem. Inspections are essentially manual, equipment is outdated, record keeping is poor, and a significant portion of trade is still conducted through bartering. The majority of customs officials have not yet been trained in applying the new regulations.

-- Tariff Nomenclature: In July, the Ministry of Finance promulgated a new harmonized tariff system, which took effect on September 1. The tariff system is based on the eight digit Harmonized System of Tariffs and conforms to ASEAN's Harmonized Tariff Nomenclature (AHTN). It is the most comprehensive change Vietnam has made in terms of coding and tariff rates. The new system consists of 10,689

lines (4200 more than the old one), of which 5,300 lines are at four and six digits. (Note: identical to the HS2K of the World Customs Organization. End note.) It also has 5,400 lines at 8 digits. There are now 15 tariff rates (down from 20) and, according to the Ministry of Finance, the simple average tariff rate increased from 16.8 to 18.2 percent. The GVN raised tariff rates on 195 items and reduced them on 106 items. Protection on 72 items was converted from special consumption taxes and supplemental taxes to tariffs.

-- Technical Barriers to Trade (TBT): On March 25, the GVN established Vietnam's WTO/TBT Office within the Directorate for Standards and Quality at the Ministry of Science and Technology (MOST). This office is the notification authority and enquiry point for all technical regulations, standards and conformity assessment procedures concerning TBT in accordance with WTO provisions. However, as Vietnam is not yet a WTO member, the office currently focuses on providing information and consultation services on Vietnam's TBT regime, including inquiries regarding Vietnam's draft TBT legislation.

-- National Treatment for imports: Vietnam currently maintains differential VAT rates on several products in contradiction to its BTA obligation on national treatment. The VAT rate on domestic cultivation products (including planted forest products), husbandry, and unprocessed aquaculture products is zero percent, while the VAT rate for imported products in these categories is five percent. Additionally the VAT rate for processed cotton made primarily from home-grown cotton is five percent while processed cotton made from imported cotton is ten percent.

Chapter 2: Intellectual Property Rights

14. (SBU) The Chapter on IPR is modeled on the WTO Agreement on Trade-Related Aspects of IPR (TRIPs) and provides for protection and enforcement of patents, trademarks, copyrights, and other types of IP. Vietnam's commitments related to trademarks and patents were due 12 months after entry into force (December 2002); commitments on copyright and trade secrets were due in May 2003. The GVN continues its efforts to revise its IPR legislative framework and to accede to various international IPR conventions. However, lack of IPR enforcement, particularly with respect to copyright and trademarks, remains a serious problem. Vietnam committed in the BTA, upon entry-into-force, to enforce existing laws, the U.S.-Vietnam Copyright Agreement, and the Paris Convention. No such routine and reliable enforcement exists; pirated and counterfeit goods are readily available in all Vietnam's major cities.

-- Border measures: In October, the Ministry of Culture and Information (MOCI) and the Ministry of Finance jointly issued an inter-ministerial circular on the protection of copyright at the border. The circular allows rights holders to request that customs seize shipments, if the petitioner can show evidence of copyright infringement. The MOF and the Ministry of Science and Technology (MOST) are currently finalizing a similar circular that deals with shipments of counterfeit goods.

-- Accession to international IP conventions: The GVN has been preparing to accede to several international IP conventions. The formal applications to the Berne Convention for the Protection of Literary and Artistic Works, the Geneva Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of their Phonograms, the Convention Relating to the Distribution of Program-Carrying Signals Transmitted by Satellite (Brussels Convention), and the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations are awaiting signature by the President. (Note: The Rome Convention is not required under the BTA. End note.) National Assembly approval is not required. The GVN is not yet ready to submit an application to the International Convention for the Protection of New Varieties of Plants (UPOV). The Ministry of Agriculture and Rural Development (MARD) is currently restructuring authority for UPOV. MARD will meet with a delegation from the UPOV Secretariat later this year to make final edits to their

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application.

Chapter 3: Trade in Services

15. (U) Vietnam's commitments to provide increased market access, MFN and National treatment to US service providers are phased in over 9 years after entry-into-force of the agreement (depending on the sector). The Ministry of Justice has submitted a draft Decree on Developing Trade in Service to the Government for approval. This decree is intended to address changes necessary for the concerned ministries to implement Vietnam's upcoming BTA services commitments. MOJ anticipates the decree will be approved by the end of the year. In December, Vietnam must implement

market access liberalization in accounting, auditing and bookkeeping services, architectural services and value-added telecom services (except Internet).

-- Dong Deposits: Until recently, foreign bank branches operating in Vietnam were prohibited from receiving deposits in Vietnamese Dong (VND) above a level of 25 percent of the branch's legal capital. Under the terms of the BTA, this ratio increases annually for U.S. banks until full national treatment is applied in year eight. In April, an official letter from the State Bank of Vietnam (SBV) confirmed the annual increases in the ratio of legal capital for U.S. banks. As stipulated in the BTA, U.S. banks are currently allowed to accept Dong deposits at a level of 100 percent of their legal capital. This ratio will rise to 250 percent in December. (Note: In response to significant lobbying from non-U.S. foreign banks, the SBV issued Decision 1084 in September increasing their ratio to fifty percent of their legal capital. End note.)

-- Legal Services: In September, the Government issued Decree 87 significantly reforming the regulatory framework for the operations of foreign law practices and foreign lawyers in Vietnam and expanding the scope of operation for foreign law firms. The decree substantially broadened the scope of practice of foreign law firms in Vietnam. Previously restricted to advising on foreign and international law in the fields of business, investment and commerce, foreign law practices are now permitted to "provide legal consultancy services and other legal services", including consultancy on Vietnamese law when the foreign law firm employs a Vietnamese lawyer or a foreign lawyer with a Vietnamese law degree. The Decree provides for offshore foreign law firms to operate in three forms: branches; foreign law firms; partnership with Vietnamese firms. Previously, only branches were permitted. Additionally, branch licenses are no longer limited to five-year (extendable) periods. Participation by foreign lawyers in Vietnamese court proceedings are still prohibited and this exclusion was extended to Vietnamese lawyers and trainee Vietnamese lawyers employed by foreign law practices.

Chapter 4: Investment

16. (SBU) Chapter 4 of the BTA is in many ways "WTO plus." Obligations in this chapter include MFN and national treatment for investment, a prohibition against expropriation without payment of prompt, adequate and effective compensation, repatriation of capital, freedom from arbitrary and discriminatory measures, prohibitions on technology transfer requirements and phasing out of trade-related investment measures. The chapter also provides for arbitration of disputes.

-- TRIMs: Vietnam committed to eliminate WTO-inconsistent trade-related investment measures (TRIMs), including trade balancing requirements and foreign exchange controls. In March, the Government issued Decree 27 amending the 1996 Law on Foreign Investment, including removing foreign exchange controls. Subsequently, in April, the GVN abolished its requirement for foreign currency surrender. Vietnam still retains restrictions on foreign shareholding in Vietnamese companies, although in March Government Decision 36 increased the ratio from twenty to thirty percent.

-- Export requirements: Vietnam took a seven-year National Treatment exception in Annex H of the BTA to permit it to require foreign investors operating in specified sectors to export 80% of their production. On December 7, 2001, the Ministry of Planning and Investment (MPI) issued Decree 718, which eliminated export requirements in a majority of the sectors to which this National Treatment exception applied. However, at the same time, Decree 718 applied this export requirement to eleven new sectors for which Vietnam did not have an exception. U.S. delegations at the BTA joint committees meetings in 2002 and 2003 emphasized that the GVN must revoke this measure. MPI assured the U.S. side that these export requirements would not be applied to U.S. investments, but the GVN could not provide these assurances in writing. In March, however, Decree 27 eliminated all mention of export performance requirements.

-- Investment licensing: In the BTA, Vietnam committed to gradually shift to an investment registration regime for most sectors. Issuance of Decree 27 made significant steps toward meeting Vietnam's obligation to remove investment-licensing requirements from specified sectors by December 2003. The following types of investments are no longer subject to investment licensing: investment projects that export 80 percent of their products (as opposed to the earlier 100 percent requirement); investments in an "encouraged" or "specially encouraged" project located in industrial zones (with the exception of certain types of projects listed in Government Decree 24 (2000)); and

investment in the manufacturing sector with a value of up to USD 5 million in investment capital.

-- Commercial Arbitration: Vietnam acceded to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards in 1995, but limited its enforcement to "commercial" disputes. However, the definition of commercial acts in the Commercial Code is very narrow, primarily relating to sale and purchase transactions. This led to contradicting judgments by different Vietnamese courts with regard to a foreign arbitral award in a case between a subsidiary of a U.S. firm (Tyco) and an Australian-Vietnamese joint venture (Leighton). As further elaborated in ref tel, the Supreme Court overturned the decision of the municipal Economic Court, ruling that, as a construction contract did not fit the narrow definition of commercial contract found in the Commercial Code, a foreign arbitral award relating to it could not be enforced in Vietnam.

-- In February, the GVN made an effort to address these problems by issuing an Ordinance on Commercial Arbitration. The ordinance defines "commercial activities" more broadly than the Commercial Code to include, *inter alia*, construction, consultancy, licensing, investment, financing, banking, and insurance. The Ordinance grants Vietnamese courts a number of grounds for non-enforcement that are essentially in accordance with the New York Convention, including: an invalid arbitration agreement, the settlement does not fall under the jurisdiction of arbitration, the arbitrator's award damages national interest, or the foreign law applied is inconsistent with the basic principles of Vietnamese legislation. Finally, while the ordinance allows parties in a dispute with foreign elements to choose where to arbitrate their case, it requires disputes involving only Vietnamese companies to arbitrate in Vietnam with Vietnamese arbitrators. It remains to be determined if, foreign companies incorporated in Vietnam will be treated as Vietnamese or foreign companies in arbitration cases.

Chapter 6: Transparency

17. (SBU) Last year, the GVN made significant changes to the "Law on Legal Normative Documents" (also known as the "Law on Laws"), which governs the way laws are drafted and published in Vietnam. These changes brought Vietnam significantly closer to meeting the transparency obligations that were due upon entry into force of the BTA. However, the Law on Laws still does not require all types of legal documents to be published. In particular, "official letters" are excluded from this requirement. (Note: this is because official letters are not included in the definition of legal normative document (LND) in the Law on Laws. End note.) Although official letters often provide the basis for policy decisions made at the Ministerial and Government level, they are not published and the GVN often responds negatively to official Embassy requests for copies. Additionally, although the BTA obligates the GVN to provide ("to the extent possible") the U.S. side an opportunity to comment on draft legislation the Law on Laws does not provide for such a comment period.

-- Comment period: Both the Office of the National Assembly (ONA) and the Vietnam Chamber of Commerce and Industry (VCCI) are looking at the possibility of posting draft laws, ordinances, decrees and other sub-law regulations on the internet to allow for public comment. While opportunities for commentary on draft laws have increased since entry-into-force of the BTA, currently draft laws and regulations are made available only on an ad hoc basis.

-- Publication of Laws: As a result of the revisions to the Law on Laws, the workload of the Official Gazette has increased dramatically. To help meet this growing demand, beginning July 1, the Official Gazette became a daily publication. (Note: previously the Official Gazette was published six times a month. End note.) To ensure timely publication of LNDs, in March, the Government (OOG) issued an official letter requiring any body promulgating an LND to forward a copy to the Office of the Government within two days of promulgation. The OOG must then publish LNDs within 15 days of promulgation.

18. (SBU) Comment: It is important to highlight the forward momentum the GVN has established in continuing to issue the laws and regulations required for BTA implementation. However, actual implementation of key obligations still falls short of what is required by the BTA. There are numerous reasons for these shortcomings: lack of capacity, lack of political will and corruption are just a few. For example, as noted above, the GVN has been unable to reduce the quantity of pirated and counterfeit goods, despite ongoing changes in the IPR legal framework. Among upcoming obligations, application of WTO-level customs valuation for U.S. imports will also represent a significant challenge for the GVN. We will maintain our efforts to engage the GVN on

the need to fully meet its obligations according to the timeframe laid out in the BTA and to encourage ongoing legal reform.

Burghardt